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No. 89-1207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PMI PETROLEUM MARKETERS, INC., and
JAMES J. PECK,

Petitioners,

– against –

GETTY PETROLEUM CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT RULE 28.1 STATEMENT

Getty Petroleum Corp. ("Getty") is the plaintiff in the United States District Court, the appellee before the United States Court of Appeals and the respondent in this Court. There are no affiliated companies, nor subsidiary companies of Getty, except wholly owned subsidiaries.

STATEMENT OF THE CASE

Petitioners in this case, PMI Petroleum Marketers, Inc., ("PMI") and James J. Peck, seek a writ of certiorari, for this Court to review the unanimous decision of the United States Court of Appeals for the Second Circuit, dated October 16, 1989. The decision affirmed a jury verdict rendered in the United States District Court for the Eastern District of New York, Mishler, J., assessing compensatory damages for acts of trademark infringement and unfair competition in the sum of $239,997.40 and punitive damages, against James J. Peck, alone, in the sum of $200,000. Getty's complaint alleged the following counts: (Count I) unfair competition in the form of trademark infringement; (Count II) Unfair competition by means

of false designation of origin, false description and false representation; (Count III) pendant New York State claims for unfair competition; (Count IV) dilution of trademark values; and (Count V) false advertisement.

The acts giving rise to the action were the unauthorized sale and delivery of non-Getty gasoline by PMI and Peck to three Getty brand gasoline stations located in Westchester County, New York: the Peekskill, Ossinging and Mohegan Lake stations. While Getty claimed infringement at a fourth station, the Poughkeepsie station, the jury refused to award damages for that station and plaintiff did not appeal the jury's verdict.

The District Court ordered a bifurcated trial in this action.

First, the Court heard issues of liability and the amount of compensatory damages. At the second trial the jury determined the amount of punitive damages to be awarded.

During the first trial the jury rendered a special verdict on the following factual issues: (1) whether the operators of the stations infringed the Getty trademark by selling non-Getty gasoline as Getty gasoline; (2) whether PMI was a contributory infringer; (3) whether Peck was a contributory infringer; (4) the amount of Getty's lost profits resulting from PMI or Peck's infringement; and (5) whether the acts of PMI or Peck, as contributory infringers were done knowingly, intentionally and with callous disregard for Getty's trademark rights. The jury returned a

verdict in the affirmative with respect to the Peekskill, Ossining and Mohegan Lake stations.

The jury found that the operators of the gasoline stations infringed Getty's trademark by selling non-Getty gasoline as Getty gasoline and that PMI and Peck were contributory infringers. Moreover, the jury found the acts of Peck and PMI as contributory infringers were done "knowingly, intentionally and with a callous disregard for Getty's trademark rights."

Compensatory damages were awarded to Getty in the following amounts with respect to each of the three stations:

Peekskill Station	- $150,003.00
Ossining Station	- $ 44,997.20
Mohegan Lake Station	- $ 44,997.20.

Following the jury's verdict on the first part of plaintiff's case, the second trial ensued consisting of the testimony of James J. Peck and documentary evidence of Peck's financial condition. The jury returned a special verdict awarding $200,000 in punitive damages against Peck and none against PMI.

The Court entered judgment on February 17, 1989 upon both jury verdicts.

While PMI and Peck originally appealed from the entire judgment, their brief filed with the United States Court of Appeals limited the appeal to: (1) the sufficiency of the evidence in support of the jury's verdict on compensatory damages against PMI and Peck; and (2) the size of the punitive damage award against

Peck and whether the award violated Peck's "due process" rights. PMI and Peck argued, unsuccessfully, that the evidence of their infringement did not demonstrate, with the sufficient degree of certainty, the exact amount of unauthorized deliveries PMI and Peck made to the three Getty stations where they concede they sold gasoline. As to punitive damages, Peck argued that the jury erred: (1) by failing to believe his undocumented and self-serving claims of insolvency; (2) by treating himself differently from his corporation, PMI, which Peck throughout the trial attempted to blame as the responsible party; and (3) that the award violated the due process clause of the 14th Amendment of the United States Constitution.

The Court of Appeals found each of PMI and Peck's arguments without merit. The court found that ample evidence existed to support plaintiff's theory of damages, "including meter readings and photographs of surreptitious deliveries of gasoline." (A-40, petition). The court noted that the defendants refused to present an alternative calculation of damages. Accordingly, the Court found that plaintiff needed only to prove, "some basis for a reasoned conclusion as to the extent of the injury." (Id.)

The Court of Appeals dismissed Peck's argument that the punitive award was excessive, observing that the jury did not believe Peck's claim of insolvency and that the burden of showing modest means fell on him. Furthermore, the Court of Appeals

found that the jury assessed a lesser sum in punitive damages than in compensatory damages.

The Court of Appeals dismissed other arguments advanced by Peck and PMI as "without merit."

Essentially, all the identical arguments which the petitioners raised and lost on below, they now ask this Court to consider as grounds for granting a writ of certiorari. However, no serious issue is raised by petitioners, warranting review by this Court. Petitioners do not set forth an important question of Federal Law.

In this respect the respondent defers to the Second Circuit itself and its ability to isolate important questions of law from insignificant or frivolous issues. The Second Circuit found the "legal issues" raised by the

defendants meritless and viewed the appeal as essentially a challenge to the sufficiency of the evidence before it and the reasonableness of the punitive damage award.

The petitioners' challenge to the compensatory damages is a challenge to the sufficiency of the evidence - the same one raised by the defendants in motions to dismiss after the plaintiff's case in the first trial and after the close of evidence in the first trial. The District Court found adequate evidence to support plaintiff's claims of liability and damages, particularly in light of evidence that the defendants "destroyed or failed to produce delivery tickets." Peck and PMI, on appeal, again challenged the sufficiency of the evidence supporting the compensatory damage

award and a unanimous Circuit Court found the evidence sufficient. It is, therefore, respectfully submitted that a third review of the record by this Court is both unnecessary, given the ample scrutiny the facts in this case have already received, and inappropriate given the gravity and importance of the many cases this Court is called upon to decide.[1]

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[1]Unfortunately, the petitioners have not fairly and accurately presented the evidence upon which the jury's verdict and the affirmance by the Second Circuit depended. Rather, they rely in their petition upon snippets, taken out of context, from the more than 1,000 pages which constituted the joint appendix in this action. While perhaps the best way to remedy this imbalance would be to present the entire record to this Court, the respondent believes that at this point to do so would place an unfair burden both on this Court and on the respondent. Respondent hopes

(Footnote Continued)

Equally unpersuasive is petitioners' claim that this Court should review the award of punitive damages. The "due process" and "equal protection" claims that PMI and Peck wish to advance were not properly preserved for appeal, as the defendants did not object on any of those grounds to the jury charge on punitive damages. The petitioners only raised the argument as an afterthought in light of this Court's decision in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909

(Footnote Continued)
that the discussion of the case that follows in the argument will provide this Court with a picture of both the character and quality of the proof offered by Getty at trial and the many obstacles that PMI and Peck placed in the way of ever fully demonstrating the scope of defendants' infringement of the Getty trademark.

(1989). On the merits the punitive damage award was reasonable and the process afforded the defendants fair. The amount awarded was less than the compensatory damages. While James Peck claimed insolvency, the jury did not believe his claim, but rather believed that his net worth statement, admitted as Exhibit 44 in evidence, accurately showed his net worth at $1,478,000. While the jury may well have believed that PMI was no longer in business and thus chose not to perform the futile act of awarding punitive damages against it, the same is not true for Peck. The evidence at trial demonstrated that a corporation using the name Dutchess Terminals operated all the facilities which were

once PMI's and employed most of the same workers. A reasonable basis existed for awarding punitive damages against Peck, but not against PMI. Finally, the defendants received both procedural and substantive due process, including the special safeguards afforded by a bifurcated trial.

SUMMARY OF ARGUMENT

A. COMPENSATORY DAMAGES

1. The petitioners ask this Court to review the sufficiency of the evidence presented in support of the compensatory damages awarded for trademark infringement. The facts in this case have already been found by the jury, sustained by the District Court judge as sufficient and these findings were reviewed by the Court of Appeals for the Second Circuit and unanimously affirmed. A third

determination of the sufficiency of the evidence, by this Court, is both unnecessary and contrary to the purpose of Supreme Court review.

2. In Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931) and Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1945), this Court set forth the rule that where injury is proven, but the nature of the wrongdoing precludes proof of damages with certainty, all a plaintiff must give is some basis for a reasoned conclusion as to the extent of the injury. In this case the defendants infringed upon Getty's trademark by delivering their own gasoline to non-Getty brand stations under cover of night and attempted to hide the scope of their infringement through, among other means, destroying

or not producing documents. The Second Circuit correctly applies Story Parchment and Bigelow in such cases and allows a recovery where a reasonable basis for the award exists. The District Court and Court of Appeals correctly concluded that such a basis existed in this case. The petitioners' challenge to this conclusion raises no substantial questions of Federal Law, but voices a mere disagreement with the application of the law to the facts. No substantial federal question is raised by this challenge.

B. PUNITIVE DAMAGES

1. The punitive damages in this case were not excessive. They were less than the compensatory damages and less, in fact, than the treble damages which would have been awarded had

Getty pursued that remedy pursuant to §35 of the Lanham Act, [15 U.S.C. §1117]. There is no reason why this Court should re-decide the factual issue of James Peck's ability to pay by granting a writ of certiorari.

2. Peck's claim that the jury's disparate treatment of him from PMI violated the equal protection clause of the United States Constitution is insubstantial. The evidence demonstrated that Peck, alone, possessed the financial resources to pay a punitive damage award and that the only effective punishment would be one aimed the responsible individual and not his now defunct corporation. The jury had a reasonable basis for treating Peck differently from PMI, even were there any merit to the unsupported conclusion that the equal

protection clause of the United States Constitution constitutes a check on a jury's power to award punitive damages in a civil lawsuit.

3. The petitioners' claim that the punitive damage award violated the due process clause of the 14th Amendment of the United States Constitution, in this case, does not raise a significant federal question and is untimely. The petitioners only raised the issue for the first time before the Second Circuit, in the light of what it considered an invitation to do so from this Court's decision in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989). In fact, James Peck received both procedural and substantive due process. The award was reasonable and not a consequence of

passion or prejudice. Moreover, it resulted from a second trial, after a finding of intentional infringement, held solely on the issue of the proper amount of punitive damages, if any, to be awarded.

ARGUMENT

POINT I

THE COMPENSATORY DAMAGES SHOULD NOT BE REVIEWED ON WRIT OF CERTIORARI

A. THE UNITED STATES SUPREME COURT SHOULD NOT BE ASKED TO CONDUCT A *DE NOVO* REVIEW OF THE FACTS FOUND BY THE JURY AND SUSTAINED ON APPEAL

The appeal by PMI and Peck of the compensatory damage award is an attempt to have yet a third court review and decide facts already determined by the jury. The jury itself already weighed the facts and the Court of Appeals determined that the evidence supported the jury's

conclusions. The Second Circuit's decision in this respect should be the final word.

While this Court is, of course, empowered to review the record in any case before it, it will not re-evaluate the evidence so long as the facts found by the jury find some support in the record. As this Court stated in Roemer v. Maryland Public Works Board, 426 U.S. 736, 758 (1976):

> We cannot say that the foregoing findings as to the role of religion in particular aspects of the colleges are clearly erroneous. Appellants ask us to set those findings aside in certain respects. Not surprisingly, they have gleaned from this record of thousands of pages, compiled during several weeks of trial, occasional evidence of a more sectarian character than the District Court ascribes to the colleges. It is not our place, however, to reappraise the evidence, unless it plainly

> fails to support the findings of the trier of facts. That is certainly not the case herein, and it would make no difference even if we were to second-guess the District Court in certain particulars.

For a similar statement of this Court's policy see, also, General Motors Corp. v. Washington, 377 U.S. 436, 441-2 (1964), "'of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean we will reexamine as a court of first instance, findings of fact supported by substantial evidence.'" (Citation omitted).

The evidence in support of plaintiff's verdict was substantial and justified the jury's well-reasoned

and particular findings of damage at three of the four stations where Getty claimed the petitioners acted as contributory infringers of Getty's trademark. While, as in each instance in which a question of fact is presented to a jury for resolution, other theories exist, in this case the jury concluded that the defendants' version of the case was unlikely and that plaintiff proved both an injury and a reasonable basis for imposing damages for the injury defendants caused. The jury's findings were unanimously sustained by the Second Circuit. The petitioners' invitation that this Court step in and make findings of fact different from those sustained below should be denied.

B. PETITIONERS RAISE NO SIGNIFICANT CHALLENGE TO THE RULE THAT GETTY REQUIRED ONLY A REASONABLE BASIS TO RECOVER ITS LOST PROFITS AT THE PEEKSKILL, OSSINING AND MOHEGAN LAKE STATIONS

The United States Supreme Court in the landmark cases of Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931), and Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1945), set forth the governing rule that where an injury is proven, the inability to prove the extent of the injury with certainty must be no hindrance to the injured party's right to recover adequate compensation. The petitioners do not challenge this rule, but claim that this case should be an exception. No grounds were presented which warrant a reconsideration of Story Parchment or Bigelow.

While Story Parchment Co. v. Patterson, supra, involved a claim brought under the Sherman Antitrust Act for price fixing, the principle set forth in that landmark case is applicable to the unfair competition claims brought by Getty against Peck and PMI. The Supreme Court noted, in refusing to characterize the jury's award as speculative:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. . . . The wrongdoer is not entitled to complain that they [damages] cannot be measured with the exactness and precision which would be possible if the case, which he alone is responsible for making, were otherwise.

Id. at 563. In Story Parchment, the Court upheld plaintiff's proof of profits which would have been realized in the absence of a price fixing conspiracy.

The Second Circuit decisions, Deering, Milliken & Co., Inc. v. Gilbert, 269 F.2d 191, 193 (2d Cir. 1959) and Brink's, Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983), cited by the Court of Appeals in upholding the jury's verdict, are fitting and proper applications of the principles set forth in Story Parchment, and Bigelow. In Brink's, Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983), the court upheld the City of New York's recovery of both punitive and compensatory damages resulting from the theft by Brink's employees, of parking meter revenues which

they were contractually obligated to collect for the City. The court noted evidence of a systematic theft over a long period of time and dismissed as speculative Brink's argument that other factors might have accounted for the deficit.

In Deering, Milliken & Co. v. Gilbert, supra, the court allowed plaintiff to estimate its damages resulting from a, "criminal scheme calculated to trade upon the Milliken trademark," id. at 192, by inferring sales from the 67,600 counterfeit hand tags delivered to the defendant bearing the Milliken mark. The court described Gilbert's defense as follows:

> Upon pre-trial examination Gilbert exercised his privilege against self-incrimination. At the trial he denied all sales of

> Milium but even after the judge stated that his testimony was "not worthy of belief," instead of producing records to show what it was he had sold, he produced no records at all. His position then, as it has been throughout these proceedings, was one of "sitting tight" and demanding that Deering, Milliken prove the damages sustained by it as a result of his infringing sales. Faced with the task of proving the scope of Gilbert's shady operation, Deering Milliken was forced to use indirect and circumstantial evidence.

Id. at 193. The court found that plaintiff could infer lost sales from the number of counterfeit hand tags missing at the defendant's premises at the time they were seized by search warrant. The court, further, held that such a showing shifted the burden of refuting plaintiff's evidence upon the defendant, either by proving the actual sales or by showing an absence

of sales. The court set forth the rule that, "[w]here, as here, the defendant controls the most satisfactory evidence of sales, the plaintiff need only establish a basis for a reasoned conclusion as to the extent of injury caused by the deliberate and wrongful infringement." Id. at 193.[2]

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[2]Nor is the holding in Deering Milliken, in any sense inconsistent with the Ninth Circuit's decision in Playboy Enterprises v. Backrack Clothing Co., Inc., 692 F.2d 1272 (9th Cir. 1982), as the petitioners suggest. In Backrack Clothing Co., Inc., the trial judge, sitting without a jury, held an equitable accounting for defendant's profits. While the Ninth Circuit refused "to engage in appellate fact finding," and on this limited ground did not reverse the District Court's finding that Playboy could not recover all of the defendant's profits based upon a showing that 43,000 counterfeit Playboy and Rabbit Head labels were manufactured, it is precisely "appellate fact finding," that the

(Footnote Continued)

It is clear, based upon the principles of the foregoing cases, that Getty's verdict should be upheld as plaintiff showed both substantial injury to its trademark and a reasoned conclusion as to the extent of the injury. The defendants simply rested after the plaintiff's case. They offered no evidence of their own to refute the damages claimed.

Plaintiff demonstrated an extensive injury inflicted by PMI and Peck. By virtue of an anonymous tip, documents were uncovered and authenticated showing deliveries to the Peekskill

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(Footnote Continued)
petitioners asked both the Court of Appeals and now ask this Court to engage in by requiring a rule which would limit plaintiff's damages to the few specific deliveries the defendants were forced to admit by uncontrovertable evidence.

station on March 23, 1986, May 15, 1986 and May 14, 1986; to the Ossining station on May 15, 1986, as well as on two other occasions without date; and to the Mohegan Lake station on May 1, 1986. Plaintiff proved two other deliveries to the Ossining station, on September 5, 1986 and September 12, 1986, even after PMI and Peck received a cease and desist letter warning them to discontinue their illegal activity.

While Peck and his employees, naturally, denied any other deliveries except those uncovered by surveillance, additional proof came from a temporary employee, Robin Berger, a college student who worked from June 1986 to the end of August, 1986, during Brenda Binney's maternity leave. She remembered dealing with Shams Ul Haque, the dealer of the

Ossining and Mohegan Lake stations, who would place orders both personally and by phone. She also remembered the Peekskill station appearing on the delivery sheets and in the files. Finally, she remembered a specific midnight delivery scheduled for a station identified as Getty, at least once during her employment with PMI. Octane tests of the gasoline, taken at all three stations, in September of 1986, further demonstrated the sale of non-Getty gasoline. Because opening and closing meter readings were available for the Peekskill station, plaintiff utilized the meter readings to quantify sales of non-Getty gasoline at that location at 877,007 gallons of unleaded gasoline and 306,333 gallons of unleaded premium gasoline. Taken together, this

constituted substantial evidence that Peck and his company, PMI, many of whose employees formerly worked for Power Test, inflicted substantial injury upon Getty in the form of sales diverted from Getty at the Peekskill, Ossining and Mohegan Lake stations.

Plaintiff provided a reasonable basis for its calculation of lost sales for all three locations, including an exact quantification of the loss for the Peekskill location. At Peekskill, the difference between metered sales at the station and Getty's actual delivery records demonstrated Peck and PMI's infringement. While the defendants challenged this estimate based upon minor discrepancies between stick readings and meter readings, as well as the general assertion that the non-Getty gasoline

may have come from other sources, neither objection has weight. The jury considered and believed that the meter readings, which Herbert Wechsler testified are more accurate than stick readings demonstrated the actual sales for the Peekskill station. The jury was entitled to and did disbelieve defendants' attempts to impeach these readings. Nor was the inference that the non-Getty sales came from Peck and PMI remote. Defendants offered no proof that others were involved in the same nefarious pursuits as the defendants. The evidence at trial demonstrated only that PMI and Peck unlawfully infringed on the Getty trademark at the Peekskill station and the surrounding area. The defendants, in fact, are the ones that ask this Court to speculate by ascribing causes to

plaintiff's injury other than the one demonstrated, Peck and PMI, with no evidence as to the existence of any alternate causal agent.

Similarly, the estimates at the Ossining and Mohegan Lake stations were entirely reasonable under the circumstances. Both stations conducted business in the same geographical area as Peekskill and documentary evidence existed demonstrating deliveries of non-Getty gasoline at both stations over an extended period of time. For Ossining, those deliveries occurred, among other times, on May 15, 1986, September 5, 1986 and September 12, 1986. Additionally, notes exist which show other deliveries at unspecified dates and times. Moreover, Robin Berger testified that the dealer of the Ossining and Mohegan

Lake station purchased gasoline from PMI and Peck throughout the summer of 1986. At the Mohegan Lake station one delivery ticket for May 1, 1986 delivery was produced. An octane rating of less than what Getty sells as its gasoline existed at both locations in September, 1986. Getty asked the jury to estimate the damage inflicted by Peck and PMI, at Ossining and Mohegan Lake based upon evidence that they were actively engaged in the infringement of Getty's trademark at these stations and in the surrounding area. The jury returned a verdict with modest awards in the sum of $44,997.20 for each station, the equivalent of the profits from slightly less than 2 truckloads of Getty unleaded regular gasoline per month, for the period

from February 1, 1985 through September 22, 1986.

The real extent of the damage to the Getty trademark will never be known. Substantial evidence of the destruction or concealment of documents in this case proved conclusively to the jury that James Peck and PMI had plenty to hide. Despite their statement in the petition for writ of certiorari, that "petitioners produced nearly one thousand documents to disprove Getty's claims," (Petition, p. 40), they do not disclose the fact that the only documents they produced occurred after lengthy motion practice to compel, which motions themselves arose only after plaintiff proved the existence of the documents through Peck's secretary Brenda Binney. The production of these documents at trial

occurred by way of a subpoena which survived a motion to quash. Plaintiff demonstrated through Exhibit 72V in evidence, that in no calendar month did the invoices ("pink slips") produced by Peck represent even one - half of the monthly deliveries made by Peck and PMI. Other missing documents included loading tickets, delivery tickets, and ledgers. Were loading tickets produced they would have shown the destination of the gasoline delivered by Peck and PMI. The jury chose not to believe that Peck's secretary knew more about the operation of the company than Peck. Rather, the jury found that James Peck lied about his involvement in the company, actively infringed the Getty trademark and concealed documents

which, if produced, would show Mr. Peck's true colors.

This case demonstrates that the principles of Bigelow and Story Parchment are correctly applied by the Circuit Court of Appeals and that no reason exists for this Court to reevaluate or make any alterations to the principle that a party may not benefit from its own wrongdoing in avoiding damages. Getty demonstrated a more than reasonable basis for the jury's award.

POINT II

PETITIONERS CHALLENGE TO THE PUNITIVE DAMAGE AWARD AGAINST PECK DOES NOT MERIT THIS COURT'S REVIEW

In challenging the punitive damage award against Peck, in the sum of $200,000, defendants raised three grounds: (1) $200,000 was excessive

in light of Peck's self-serving claims of insolvency; (2) the jury acted unfairly by awarding punitive damages against Peck, but not the corporation, PMI, which was created by Peck as a shield; and (3) the award violates due process under the Fourteenth Amendment of the United States Constitution.

These arguments lack merit. The jury decided the question of Peck's ability to pay a punitive award against him in a separate proceeding held after the jury determined that Peck acted intentionally, willfully and with a callous disregard of plaintiff's trademark rights. The jury, justly, concluded that an award of punitive damages against Peck and not against PMI, the now defunct corporation that Peck utilized to sell gasoline to Getty gasoline stations

best serves the purposes of deterrence and punishment. Finally, defendants neither preserved nor demonstrated their amorphous due process claim, which appears to be a repetition of their assertion that Peck cannot afford to pay such a judgment and the notion that the court should have charged utilizing a standard of recklessness. Plaintiff in this case proved much more than recklessness, plaintiff proved that Peck intentionally, knowingly and callously infringed plaintiff's trademark rights.

A. PUNITIVE DAMAGES AWARDED AGAINST JAMES PECK WERE REASONABLE IN AMOUNT

Defendants claim that the amount of damages awarded exceed Peck's ability to pay is not a legal challenge and raises no federal question warranting this Court's review. The

jury found otherwise after a separate proceeding limited precisely to James Peck's ability to pay. At that proceeding, Mr. Peck's financial statement for 1986 was admitted into evidence. This statement showed a net worth of $1,478,000 including, inter alia, his interest in the going concern, then PMI, a company with $10,000,000 in revenues in 1986. The jury concluded that the financial statement of 1986 reflected the present wealth of James Peck.

Peck produced no evidence to document his claims of insolvency. His hard luck claim that he is now pumping gas and that his business, PMI, fails to exist is refuted by the fact that the same personnel, minus Manzi, operate PMI's assets as a going concern under a new corporate entity,

"Dutchess Terminals". Brenda Binney, Betty Modesto and Vasoughi "Russo" still "run" the company. The jury, appropriately concluded that Mr. Peck did not merely transfer Dutchess Terminals to Russo for no consideration, but rather is distancing himself from his source of income to color his present facade.

It is worth pointing out that had plaintiff pursued its remedy of treble damages pursuant to § 35 of the Lanham Act, [15 U.S.C. § 1117], a compensatory remedy, then plaintiff would have recovered an additional $479,994.80 above the compensatory damages actually awarded, an amount exceeding the punitive award by $279,994.80.

B. THE JURY CORRECTLY IMPOSED A PUNITIVE AWARD ON JAMES PECK AND NOT PMI

Defendants provide no authority for their assertion that the absence of a punitive award against PMI warrants vacating the award against Peck. Even less do they produce any authority for the proposition that these findings constituted a denial of equal protection. The jury's determination can no more be construed as governmental action, bringing this case under the equal protection clause, than a punishment by the state, an argument rejected by the Supreme Court in Browning-Ferris Industries of Vermont v. Kelco, 109 S. Ct. 2909 (1989). Moreover, the jury's decision to award punitive damages against Peck, rather than PMI, was reasonable.

In this respect, it ironic that the petitioners rely upon the Second Circuit decision in Smith v. Lightning Bolt Productions, Inc., 861 F.2d 363 (2d Cir. 1988). In that case the Circuit upheld a punitive recovery against defendant Solerwitz in the sum of $500,000, even while vacating and remanding an award in the like sum against Solerwitz's corporation, the defendant Lightning Bolt. The jury in this case did what the Second Circuit said it should have done in Smith v. Lightning Bolt Productions, Inc. The evidence before the jury demonstrated that James Peck left his corporation, PMI, as a shell with no assets to satisfy a judgment. Accordingly, the jury correctly concluded that a punitive award would only be meaningful against Peck and not PMI.[3]

Furthermore, it certainly fell within the jury's discretion to award punitive damages against Peck, whom the jury found to be the living embodiment of the wrongful acts of the trademark infringement committed by PMI. While Peck, throughout the trial, attempted to avoid being associated with the corporation he created, the jury did not believe that either Michael Manzi or Peck's secretary, Brenda Binney, ran PMI. Rather the jury believed that Peck alone ran it. Peck's ruse fooled none of the jurors and they said so by pointing their fingers at James Peck.

C. THE DEFENDANTS MAY NOT CLAIM A VIOLATION OF DUE PROCESS IN THIS CASE

Petitioners raised the claim that plaintiff is not entitled to recover punitive damages against Peck, as it

violates Peck's due process rights under the Fourteenth Amendment, for the first time before the Second Circuit. This argument is both untimely and incorrect.

It is untimely because the defendants never raised the issue at the district court, either by objecting to the jury charge on punitive damages or by motion for judgment, N.O.V. Accordingly, the challenge is untimely, pursuant to Fed. R. Civ. P. 51 and may not now be challenged due to a subsequent Supreme Court decision leaving the issue, arguably, open. Browning-Ferris Industries of Vermont v. Kelco, 109 S. Ct. 2909 (1989). In fact, the United States Supreme Court in Browning-Ferris, refused to decide the due process challenge on the grounds that the appellant failed to

raise the issue in any of the lower courts.

However, the defendants in this case received both substantive and procedural due process. Ample evidence existed that Peck possessed the financial ability to pay the punitive award and no showing was made that the award resulted from passion or prejudice. As this Court stated in Smith v. Lightning Bolt Productions, Inc., supra, "the incompleteness of the record as to Solerwitz's net worth is not a basis for reducing the punitive damage award against him, for it is the defendant's burden to show that his financial circumstances warrant a limitation of the award." Id. at 373.

Nor is there any merit to the argument that the court should have included recklessness as part of its

definition of callous disregard in the jury charge. The court set a far higher standard than recklessness in its charge to the jury, requiring the plaintiff to prove that the infringement was done "intentionally, knowingly and with a callous disregard of plaintiff's trademark rights." By contrast, in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967), plaintiff sought to recover punitive damages in an action against a drug manufacturer for negligent distribution of a defective product. As no intentional violation occurred, the court merely considered what level of recklessness must be shown in order to recover punitive damages under New York law. Certainly, Peck did not suffer a violation of due process where plaintiff's

burden was to prove an intentional violation of its trademark rights.

Finally, the trial court afforded the defendants a complete hearing, separate from the main trial, on the question of the appropriate amount to be imposed as punitive damages. The Second Circuit approved such an approach in Brink's, Inc. v. City of New York, supra, 717 F.2d at 707, even while finding that it did not constitute an abuse of discretion to refuse bifurcation in Getty Petroleum Corp. v. Island Transportation Corp., 862 F.2d 10 (2d Cir. 1988) cert. denied, 109 S. Ct. 1642 (1989). In light of the procedural safeguards afforded this defendant, one is hard pressed to understand in what fashion he received less than due process of law.

CONCLUSION

For all of the above reasons, this Court should refuse to issue a writ of certiorari, as demanded in the petition.

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